ED ELLIS

IBLA 88-123 Decided March 14, 1991

Appeal from the decision of the Alaska State Office, Bureau of Land Management, denying protest against relinquishment of portion of lands within State selection application AA-17584 to extent of overlap with mining claim AA-14224.

Affirmed.

1. Alaska: Statehood Act--Alaska National Interest Lands Conservation Act: State Selections

Pursuant to sec. 906(f)(2) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(f)(2) (1988), the State of Alaska may relinquish any selec- tion of land filed under the Alaska Statehood Act prior to tentative approval, except for land conveyed pursuant to subsec. (g). A protest against the relinquishment of such a selection is properly denied where the unrelinquished portion of the selection is in conformity with the requirements of pertinent statutes and regulations.

APPEARANCES: Ed Ellis, pro se.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

Ed Ellis has appealed from the November 2, 1987, decision of the Alaska State Office, Bureau of Land Management (BLM), dismissing his pro-test and accepting the relinquishment by the State of Alaska of certain lands subject to State selection application AA-17584. In his notice of appeal, appellant asserts that the effect of BLM's decision is to take his rights in a mining claim.

On June 3, 1974, appellant and Jennie Lynn Ellis located the No. 1 Above Crescent Placer mining claim in sec. 29, T. 5 N., R. 2 W., Seward Meridian, Alaska, on land within the Chugach National Forest. Upon recordation with BLM, the claim was assigned serial No. AA-14224.

On July 3, 1978, the State of Alaska filed National Forest Community Grant Selection application AA-17584 pursuant to section 6(a) of
the Alaska Statehood Act of July 7, 1958, P. L. 85-508, 72 Stat. 329, as

amended by section 906(a)(2) of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2437 (1980), for certain lands within the Chugach National Forest including the NW¼ of sec. 29. BLM granted tentative approval to the State for these lands on November 15, 1983, excluding the mining claim recorded as AA-14224. The portion of the mining claim which overlapped the State selection included certain structures including a 20- by 12-foot cabin.

On June 20, 1986, the Ellises filed a form purporting to relinquish that portion of their mining claim within the State selection application. Nevertheless, the relinquishment form they submitted makes it clear that they had no intention of abandoning whatever rights they had established in the mining claim. The sole purpose was to facilitate the transfer of title from the Federal Government to the State with an express intention of preserving whatever rights that had been established by locating another claim on the same land, pursuant to state law. However, the State did not wish to acquire the land which appellants occupied, and filed a relinquishment of that portion of its selection application within mining claim AA-14224 on June 24, 1987. Ellis filed a protest to the State relinquishment contending it would result in an isolated inholding.

[1] In denying appellant's protest, BLM referred to section 906(f)(2) of ANILCA, 43 U.S.C. § 1635(f)(2) (1988), which provides:

> (2) The State of Alaska may, by written notification to the Secretary, relinquish any selections of land filed under the Alaska Statehood Act or subsection (b) of this section prior to receipt by the State of tentative approval, except that lands conveyed pursuant to subsection (g) of this section may not be relinquished pursuant to this paragraph.

BLM pointed out the relinquished lands had not been previously tentatively approved and were not legislatively conveyed pursuant to subsection (g), and concluded that the State was not barred from relinquishment. BLM also referred to the requirements of 43 CFR 2627.3(c)(3) and concluded that the relinquishment did not result in an isolated inholding in viola- tion of that regulation. BLM also pointed out that even after the relinquishment, the land remaining subject to the selection contained much more than the 160-acre minimum required by the Alaska Statehood Act, as amended.

In his notice of appeal, appellant states that the BLM decision "takes my rights to a property I have held in good faith since 1974, and which Federal Judge Kleinfeld also ruled belonged to me under State Law." Appellant has submitted a copy of a decision including findings of fact and conclusions of law in a criminal trespass proceeding brought against him by
the Forest Service, United States v. Ellis, A86-0673 CR (D. Alaska, May 14, 1987). The court acquitted appellant of those charges.

It is not clear how appellant believes his acquittal in United States v. Ellis affects our consideration of this appeal. In rejecting the Govern-ment's argument in that case, the court avoided having "to resolve complex questions of title and of federal-state land transfers under the Alaska

Statehood Act." United States v. Ellis, supra at 13. The court pointed out that the matter before it was a criminal, not a civil case, id., and concluded that it would be improper to convict Ellis because his criminal responsibility would depend "on matters of which he had no knowledge or notice." Id. This appeal is a civil matter, not a criminal one, and it involves issues which the court did not consider. Furthermore, the State of Alaska was not a party to the litigation between the United States and appellant. We find nothing in the court's opinion to preclude the State from exercising its right to relinquish land under 43 U.S.C. § 1635(f)(2) (1988), nor do we find any language which authorizes BLM to refuse to accept the State's relinquishment.

We do not see how appellant's "taking" argument provides any basis for refusing to accept the State's relinquishment in light of the statu- tory language of 43 U.S.C. § 1635(f)(2) (1988). Indeed, we consider appellant's taking argument to be premature because it is not clear that appellant is precluded from re-establishing whatever rights he had to his claim. Because the land is no longer segregated from appropriation by the State selection application, appellant may be able to relocate his claim, provided that no other circumstance precludes relocation. Moreover, the express findings made by the court in United States v. Ellis, supra, raise an issue as to the effectiveness of appellant's relinquishment of the min-ing claim. 1/ Accordingly, we conclude that BLM properly denied appellant's protest. 2/

1/ In considering the effectiveness of the relinquishment of a mining claim, the Department has followed decisions involving relinquishments of other public land entries. E.g., Leo J. Kottas, 73 I.D. 123, 130 (1966), aff'd, Lutzenhiser v. Udall, No. 1371 (D. Mont. June 7, 1968), aff'd, 432 F.2d 328 (9th Cir. 1970). Although it may be suggested that appel- lant's relinquishment was knowing and voluntary because he expected his right to be confirmed by the State, a majority of the Board in Heirs of Lisbourne, 97 IBLA 342 (1987), rejected a dissenting opinion view that a Native allotment application "relinquishment was clearly knowing and voluntary" when it was made with the expectation that the party in whose favor the relinquishment was made would ultimately convey it to the applicant. Id. at 347.

The circumstances surrounding appellant's relinquishment of the min- ing claim are set forth in detail in the court's opinion in United States v. Ellis, supra. Although this action appears to have been initiated by the Forest Service, the United States itself was a party to this litiga-tion. The court expressly found that BLM and the Forest Service were aware of appellant's intention in relinquishing the claims, that appellant intended to preserve his rights under state law, that appellant consulted with BLM, and that neither the Forest Service nor BLM warned him of the possible consequences of his partial relinquishment of his claim. We note that in the case of Deming v. Cuthbert, 5 L.D. 365 (1887), the Department deemed a relinquishment ineffective because it was made with a view to legitimatizing rather than abandoning an entry.

2/ We note that under 43 CFR 4.413, an appellant is required to serve a copy of his notice of appeal and any statement of reasons on the designated

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Byrnes
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

fn. 2 (continued)
office of the Solicitor and each "adverse party" named in BLM's decision. Failure to serve the required copies subjects an appeal to summary dismissal. 43 CFR 4.402, 4.413(b). Appellant has not complied with this requirement. The purpose of this requirement is to allow the adverse party the opportunity to defend the correctness of BLM's decision by fil- ing an answer, as provided by 43 CFR 4.414. Beard Oil Co., 105 IBLA 285, 287 (1988). An "adverse party" to an appeal is one who will be disadvantaged if the appellant prevails before the Board. Id. Clearly, the State of Alaska is an adverse party to the extent that appellant seeks reversal of BLM's decision to accept the State's relinquishment of the land overlapping appellant's mining claim. Nevertheless, the State was not named as an adverse party to be served in BLM's decision, so the appeal is not subject to dismissal for failure to serve the State.

Furthermore, the Board has expressed its reluctance to dismiss appeals for failure to serve the Solicitor. In James C. Mackey, 96 IBLA 356, 359, 94 I.D. 132, 134 (1987), we noted that unlike the failure to file a timely notice of appeal, failure to serve a statement of reasons or answer does not deprive this Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the time required only makes an appeal "subject to summary dismissal." (Italics added.) The Board avoids procedural dismissal if there has been no showing that a procedural deficiency has prejudiced an adverse party. Indeed, in the absence of such a showing, dismissal of an appeal might be deemed an abuse of discretion. See United States v. Rice, No. CIV. 72-467, PHX WEC (D. Ariz. Feb. 1, 1974), revers-ing United States v. Rice, 2 IBLA 124 (1971). Inasmuch as we affirm BLM's decision, however, our decision does not adversely affect the State and we see no point in withholding our decision so that the State and the Solicitor may be brought into this appeal. See Southern Utah Wilderness Alliance, 114 IBLA 326, 334 n.5 (1990).